Nos. 90-1341 and 90-1517

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY,
Petitioner,
v.
STATE OF OHIO, *et al.*,
Respondents.

STATE OF OHIO, *et al.*,
Cross-Petitioners,
v.
UNITED STATES DEPARTMENT OF ENERGY,
Cross-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

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QUESTIONS PRESENTED

1. Whether the express waivers of federal sovereign immunity contained in Section 313 of the Clean Water Act, 33 U.S.C. § 1323, and Section 6001 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6961, for "all requirements" of these laws waive sovereign immunity from civil penalties in CWA and RCRA enforcement actions brought by States.

2. Whether the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365, and the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, which expressly authorize States to bring suits against "any person (including the United States)" and expressly authorize "appropriate civil penalties," constitute waivers of federal sovereign immunity from civil penalties.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. These organizations and their members have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments.

States and the federal government share overall responsibility for enforcing the Clean Water Act and the Resource Conservation and Recovery Act. Because of the lack of meaningful federal enforcement of environmental laws against federally owned facilities, the States have, in effect, sole responsibility for the enforcement of CWA and RCRA at federal facilities such as the Fernald, Ohio uranium processing plant that is the subject of this litigation.

Effective enforcement of the environmental laws at federal facilities is critical to the health and safety of the citizens of every State. Such effective enforcement "depends heavily on two key factors—voluntary compliance by the regulated community", which includes vast numbers of federally owned facilities, "and diligent, independent oversight of environmental activities by state and federal regulators." National Governors' Association & National Association of Attorneys General, *From Crisis to Commitment: Environmental Cleanup and Compliance at Federal Facilities* 10 (1990). "Given the history of noncompliance at many federal facilities," however, "it is clear that effective independent oversight by states is necessary to ensure that environmental laws are being followed." *Id.*

The federal government's persistent but ultimately untenable assertion of sovereign immunity from the civil penalties provisions of CWA and RCRA thwarts effective enforcement of environmental laws at large numbers of federal facilities throughout the country. *Amici* ac-

cordingly submit this brief to assist the Court in the resolution of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Facilities owned by federal agencies such as petitioner DOE have produced some of the nation's worst environmental problems. Because of the federal government's very limited role in enforcement pursuant to its "unitary theory of the executive," [2] the States have primary responsibility for enforcing CWA and RCRA at federal facilities. Congress has expressly waived the federal government's sovereign immunity from a wide range of state enforcement mechanisms available under these statutes. The issue in this case is whether this waiver extends to CWA and RCRA civil penalties.

Resolution of this issue turns on the proper application of well-established rules governing the waiver of sovereign immunity. *Amici* fully agree with DOE as to the fundamental importance of sovereign immunity and generally agree with DOE's articulation (Pet. Br. 16) of the

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

[2] *See Cleanup at Federal Facilities: Hearings Before the Subcommittee on Transportation, Tourism, and Hazardous Materials of the House Committee on Energy and Commerce*, 100th Cong., 2d Sess. 452-54 (1988) (Statement of Acting Assistant Attorney General Marzulla) (institution of judicial and administrative enforcement proceedings by EPA concerning federal facilities disallowed pursuant to theory that "the exercise by any officer at EPA of unilateral authority over another executive branch agency . . . would be unconstitutional and clearly inconsistent with existing Executive Branch dispute resolution mechanisms"); Comment, *Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities Under RCRA*, 57 U. Chi. L. Rev. 845, 846-47 & n.10 (1990); National Governors' Association & National Association of Attorneys General, *From Crisis to Commitment*, *supra*, at 7 ("[D]ue largely to opposition from the Department of Justice, EPA has been unable to impose a credible enforcement presence at federal facilities.").

principles that govern this question.[3] As *amici* have asserted many times before this Court, the "clear statement" rule protects the proper spheres of government sovereignty—both state and federal. *See Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989).

Amici disagree, however, with DOE's proposed application of these rules to CWA and RCRA. The "federal facilities" provisions, Section 313 of CWA, 33 U.S.C. § 1323(a), and Section 6001 of RCRA, 42 U.S.C. § 6961, are clear statements of congressional intent to waive the federal government's sovereign immunity from all remedies necessary to enforce those laws—including civil penalties. In addition, the "citizen suit" provisions of both CWA and RCRA waive federal sovereign immunity from civil penalties. 33 U.S.C. § 1365; 42 U.S.C. § 6972.

DOE concedes that Section 313 of CWA and Section 6001 of RCRA are clear statements that waive most federal sovereign immunity defenses. DOE does not dispute, for example, that a State may, under CWA and RCRA, obtain sweeping equitable relief against noncomplying federal facilities. Congress has specifically authorized States to enjoin operation of a federal facility, mandate costly improvements to a facility, and impose other far-reaching affirmative obligations on the federal government when necessary to ensure compliance with CWA or RCRA. Nor is there any dispute that Congress has waived federal immunity from contempt sanctions—including monetary penalties—imposed to coerce compliance with injunctive

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[3] It may be, however, that the "clear statement" rule of statutory interpretation should apply with less force when—as in this case—the federal sovereign acts to *waive* its own immunity, than when the federal sovereign acts to *abrogate* state sovereign immunity. In waiver situations, the risk of unwarranted intrusion upon the "historic police powers of the States," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), is not present.

orders.[4] DOE likewise concedes that the citizen suit provisions of CWA and RCRA authorize wide-ranging enforcement actions against federal facilities. *See* Pet. Br. 31, 42-43 (citing 33 U.S.C. § 1365; 42 U.S.C. § 6972(a)).

DOE nonetheless contends that Congress excluded civil penalties from the sweeping waivers of sovereign immunity contained in these statutes. DOE is in error. Section 313 of CWA clearly and unambiguously states that "[e]ach department, agency or instrumentality of the executive, legislative, and judicial branches of the federal government" is "subject" to "*all* Federal, State, interstate and local requirements" respecting water pollution, including all "sanctions." 33 U.S.C. § 1323(a) (emphasis added). The natural meaning of the words "requirements" and "sanctions" encompasses the civil penalties at issue here. By using the word "all," Congress clearly indicated its intention to waive sovereign immunity from every kind of sanction. *See Norfolk & Western Ry. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1164 (1991).

Furthermore, if no general waiver of sovereign immunity from civil penalties was intended by Section 313 of CWA, then several portions of that provision would be meaningless. Congress would have no reason to exempt federal officials from individual liability for civil penalties if civil penalties were not a permitted remedy in enforcement actions against federal facilities. Similarly, Congress would have had no need to limit the federal government's liability for civil penalties to those civil penalties "arising under federal law."

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[4] *See* Pet. Br. 18 ("the federal facilities provision . . . concededly waives federal sovereign immunity from injunctive relief and sanctions to enforce compliance with such injunctions"); *id.* at 24, 35.

The citizen suit provisions of CWA and RCRA provide an independent source for the waiver of federal sovereign immunity from civil penalties. Section 505 of CWA, 33 U.S.C. § 1365, authorizes "any citizen" to sue "any person, including . . . the United States," to enforce the Act. Section 7002 of RCRA, 42 U.S.C. § 6972, authorizes citizen suits in virtually identical language. Each provision similarly grants federal district courts the authority to impose "any appropriate civil penalties." 33 U.S.C. § 1365; 42 U.S.C. § 6972(a).

Finally, Section 6001 of RCRA contains a broad waiver of sovereign immunity from civil penalties. Like CWA, RCRA expressly waives sovereign immunity from "*all* Federal, State, interstate, and local requirements, both substantive and procedural . . . in the same manner, and to the same extent, as any person is subject to such requirements." 42 U.S.C. § 6961 (emphasis added). Section 6001 explictly includes "sanctions" within the definition of procedural requirements. As in CWA, the word "all" in RCRA makes clear Congress's intention to subject the federal government to the full range of RCRA enforcement mechanisms.

CWA and RCRA are predicated upon our federalist scheme of dual sovereignty. Effective enforcement depends upon the availability to both state and federal authorities of a full range of enforcement mechanisms, including civil penalties, for use against all violators. Yet DOE takes the position that federal facilities are exempted from one critical enforcement mechanism, civil penalties, whereas state and local government facilities are not so exempted. And DOE takes this position even though it would mean that States, indisputably empowered to impose potentially huge demands on the federal fisc through sweeping affirmative injunctive relief (aided

as necessary by contempt sanctions), would be deprived of the civil penalties option, a far less intrusive approach that might be more appropriate to a particular regulatory problem.

DOE thus ignores both the clear and unambiguous language of CWA and RCRA and the dual sovereignty principles that are the basis for enforcement of those statutes. *Amici* accordingly urge the Court to affirm the judgment of the court of appeals insofar as that court found CWA and RCRA to waive federal sovereign immunity from civil penalties.

ARGUMENT

I. CWA AND RCRA CLEARLY WAIVE FEDERAL SOVEREIGN IMMUNITY WITH RESPECT TO ALL ENFORCEMENT MECHANISMS, INCLUDING CIVIL PENALTIES.

A. CWA's Federal Facilities Provision Is A Clear Statement Waiving Sovereign Immunity From Civil Penalties.

Section 313 of CWA contains a sweeping waiver of federal sovereign immunity:

> Each department, agency, or instrumentality . . . of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity. . . .

33 U.S.C. § 1323(a). DOE concedes that this language is a clear statement of congressional intent to waive federal sovereign immunity from an extremely broad range of state enforcement actions, including those seeking extensive equitable relief. *See* Pet. Br. 18, 24, 35. DOE

nonetheless contends that Congress intended to omit civil penalties from the waiver.

Section 313's waiver, however, unambiguously encompasses civil penalties. Parsed to the language that controls this case, Section 313 states: "the Federal government . . . shall be subject to . . . all . . . State . . . requirements . . . and . . . sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." A civil penalty is a sanction, as that term is commonly understood. *See* Black's Law Dictionary 1341 (Rev. 6th Ed. 1990) (sanction is "part of a law which is designed to secure enforcement by imposing a penalty for its violation"). Congress explicitly waived federal sovereign immunity from "all" sanctions. As this Court recently held in *Norfolk & Western Ry. v. American Train Dispatchers Ass'n*, the word "all" in a federal immunity statute "means what it says," absent clear indication to the contrary. 111 S. Ct. at 1164.[5]

DOE seeks to avoid the plain meaning of Section 313 by contending that the term "sanctions" is inseparable from the immediately preceding term "process." Pet. Br. 19-20. As DOE would have it, the sanctions referred to in Section 313 are limited to those imposed to enforce compliance with judicial "process"—contempt sanctions, for example. Congress, however, did not waive immunity for "sanctions to enforce judicial process," as it could have done had it so intended. Rather, Congress explicitly waived immunity for "all . . . process *and* sanctions."

Had Congress intended the meaning DOE now ascribes to Section 313, much of the remainder of that provision would have been wholly unnecessary. First, Section 313

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[5] In *Norfolk & Western*, the Court construed 49 U.S.C. § 11341(a), which grants rail carriers legal immunity for certain transactions. The Court noted that "all" is a word that "indicates no limitation," and that the absence of limitations is "inherent in the word 'all.'" 111 S. Ct. at 1163, 1164.

expressly removes any risk of personal liability for civil penalties against federal officials in suits against federal facilities. 33 U.S.C. § 1323(a). If the preceding language of this provision was not intended to waive sovereign immunity for civil penalties, Congress would have had no need to include this proviso protecting individual federal officials. Second, Section 313 does impose one specific limit on the kinds of civil penalties for which the federal government is liable; the penalties must arise under federal law. *Id.* That provision would also be superfluous if the preceding language in Section 313 had not been intended to waive immunity for civil penalties.[6] *See Mountain States Tel. & Tel. Co. v. Santa Ana*, 472 U.S. 237, 249 (1985) (court should reject construction that would render part of a statute superfluous); *Crandon v. United States*, 110 S. Ct. 997, 1008 (1990) (Scalia, J., concurring) (same).[7]

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[6] Additionally, this proviso subjects the federal government to liability for "civil penalties arising under Federal law *or* imposed by a State or local court to enforce an order or the process of such court." *Id.* (emphasis added). The proviso explicitly distinguishes between "civil penalties arising under federal law" on the one hand, and sanctions imposed to enforce compliance with state and local judicial orders on the other.

[7] As one court has explained, by limiting the federal waiver for civil penalties in this way, Congress has:

> carve[d] out of the generic categories of civil penalties previously imposed those civil penalties which *did not* arise under federal law or which *were not* imposed by a local court order for enforcement purposes. The provision exempts the United States from liability for those civil penalties, and leaves the residue of the generic category of civil penalties (e.g., those that *arise* under federal law, or which *were* imposed by a state or local court) to be borne by the United States. . . . [T]he phrase operates to delimit the broader category of civil penalties for which liability has already, in the mind of the draftsman, been imposed by the clear intendment and all-

The civil penalties at issue here arise under federal law and therefore fall within Section 313's sovereign immunity waiver. The penalties punish violations of the permit system established by CWA. The Act expressly states that the States are "implement[ing] the permit programs *under* sections 1342 and 1344". 33 U.S.C. § 1251(b) (emphasis added). The Ohio regulatory scheme that implements CWA incorporates federal water pollution standards not by chance or by independent choice, but because those are the minimum standards CWA requires for a state implementing program. The civil penalties at issue here were incorporated into Ohio law because the CWA *required*, as a condition of federal approval of the State's regulatory scheme, adequate enforcement authority "including civil and criminal penalties." 33 U.S.C. § 1342(b)(7); 40 C.F.R. 123.27(a)(3). The Ohio enforcement plan now being contested by DOE was specifically approved by EPA pursuant to these statutory and regulatory provisions. Furthermore, EPA can directly enforce the permit requirements as federal requirements. 33 U.S.C. § 1319(a)(1).[8]

DOE bases its construction of the "arising under" language of Section 313 on the construction of analogous language in 28 U.S.C. § 1331. Section 1331, however, has no bearing on the interpretation of CWA because Congress sought wholly different objectives in limiting federal

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inclusive scope of the earlier "all requirements, substantive and procedural" language.

Maine v. United States Dept. of Navy, 702 F. Supp. 322, 329 (D. Me. 1988) (emphasis in the original), *appeal pending*, No. 91-1064 (1st Cir.).

[8] This section states that:

whenever . . . the Administrator [of the EPA] finds that any person is in violation of any condition or limitation which implements [the Clean Water Act] in a permit issued by a State . . . he shall proceed *under his authority* . . . .

33 U.S.C. § 1319(a)(1) (emphasis added).

court jurisdiction under that provision. Section 1331 is intended to ensure that the subject matter jurisdiction of the federal courts remains within the control of Congress. Section 313, by contrast, is intended to ensure that States have adequate enforcement authority to make federal facilities comply with the nation's water pollution laws.[9] As this Court has made plain—and as DOE acknowledges—the term "arising" must be interpreted in light of Congress's specific intent.[10] *Cf. Kosak v. United States*, 465 U.S. 848, 854 (1984) ("arising in respect of" limitation on waiver of sovereign immunity means "associated in any way with"); *Sheridan v. United States*, 487 U.S. 392, 409 (1988) (O'Connor, J., dissenting) ("arising out of" limitation on waiver of sovereign immunity means "associated in any way with").

The history culminating in passage of Section 313 provides confirming evidence of Congress's clear intent to waive sovereign immunity from civil penalties. Section 313 was amended in 1977 in direct response to *Hancock v.*

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[9] The reason for the inclusion of the "arising under" language in CWA is clear. The preceding language in Section 313 waived sovereign immunity for all sanctions imposed by "Federal, state, interstate, or local" authorities. CWA does not have a mechanism for federal approval, and thus federal control, over the level of interstate or local sanctions. Congress wanted to ensure that the federal government would be liable only for those civil penalties included in state-administered enforcement schemes approved by EPA. This provision protects the federal government from exposure to a plethora of local penalties that have not been reviewed and approved pursuant to CWA.

[10] DOE notes that the language "arising under the laws of the United States" in the Constitution has a different meaning than the identical language in Section 1331. DOE argues that cases interpreting the constitutional language have no relevance because "[t]here is no reason to believe that Congress intended to refer to the constitutional meaning of those words when it added the proviso to Section 313(a)." Pet. Br. 35 n. 21. Of course, for the reasons discussed above, there is likewise no basis for believing that Congress intended to refer to Section 1331.

Train, 426 U.S. 167 (1976), and *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200 (1976). Those cases addressed whether the Clean Air Act and CWA required federal facilities to comply with State-issued discharge permits. Both statutes required federal facilities to comply with water and air pollution "requirements." The Court perceived a distinction between "substantive requirements," meaning the actual limits that the statutes placed on pollution, and "procedural requirements," which the Court defined as including all "enforcement mechanisms." Because Congress had not made clear that it intended to waive sovereign immunity for *all* requirements, the Court declined to find a waiver of immunity for procedural requirements. *Hancock*, 426 U.S. at 182-186. The Court then invited Congress to "legislate to make [its] intention manifest." *Hancock*, *id.*; *State Board*, 426 U.S. at 228.

In response, Congress amended Section 313 of CWA in 1977 to specify that federal facilities must comply with "*all*" requirements respecting water pollution "to the same extent as any person is subject to these requirements." In addition, Congress added an even more specific sentence, now the second sentence of Section 313, explaining that "all requirements" includes not only "substantive or procedural" requirements but also "any other requirement whatsoever." 33 U.S.C. § 1323(a); *see also* S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4326. Congress has thus made clear its intention that federal facilities be subject to all procedural requirements. This Court has already ruled that "procedural requirements" include enforcement mechanisms. *See Hancock*, 426 U.S. at 182-86. Under CWA civil penalties are one such mechanism.

DOE's asserted interpretation of Section 313 fails to take account of the inconsistency between that interpretation and the clear, overarching congressional intent to make federal facilities subject to effective state en-

forcement. Congress has explicitly waived sovereign immunity for *all* "requirements" and *all* "sanctions." Those provisions are a clear statement of congressional intent to waive immunity from civil penalties. DOE's contrary position does not rest on the "clear statement" rule, for a clear statement can be sweeping or narrow, general or detailed. Instead, DOE is in effect asking the Court to adopt a new "detailed statement" rule pursuant to which Congress could not waive immunity from "all" requirements and sanctions, but would have to identify precisely each requirement and sanction that has been waived. The clear statement rule is a workable and appropriate rule, and is satisfied when Congress's intent to waive immunity is manifest, as it is here.

In similar contexts, this Court has rejected efforts to truncate broad, clearly stated waivers of federal sovereign immunity. In *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951), for example, the Court rejected an argument very similar to DOE's reading of Section 313. The statute at issue in *Yellow Cab* made the United States liable "in the same manner and to the same extent as a private individual" for "*any claim* . . . on account of personal injury or death . . . caused by" the negligence of a federal employee. 340 U.S. at 548 (emphasis added). This waiver was held to encompass claims for contribution even though the statute did not expressly mention contribution claims, because Congress had made plain its intention to effect a sweeping waiver. The absence of any specific mention of contribution, the Court held, did not create ambiguity as to Congress's intent to waive immunity from "any claim." Identical reasoning governs this case. *See also Canadian Aviator v. United States*, 324 U.S. 215, 222 (1945) (broad waiver cannot "be thwarted by an unduly restrictive interpretation").

B. CWA's Citizen Suit Provision Contains A Clear Statement Waiving Federal Sovereign Immunity From Civil Penalties.

Section 505 of CWA, 33 U.S.C. § 1365, also unambiguously waives federal sovereign immunity from civil penalties. This provision authorizes any "citizen" to sue any "person" for enforcement against violations of the CWA permit system. As DOE concedes, that provision authorizes wide-ranging equitable relief to enforce compliance. Section 505 expressly defines "person[s]" subject to such suits to include the United States, and includes States among the "citizens" who may initiate such actions. Section 505 also clearly states that federal district courts have jurisdiction to impose all appropriate remedies in citizen suits, including "any appropriate civil penalties under section 319(d) of this Act." Congress's intent to impose civil penalties on the federal government could not be more clearly manifested.

DOE seeks to create ambiguity in Section 505 where none exists. DOE argues that Section 505 is ambiguous because it refers to CWA's general civil penalties provision at 33 U.S.C. § 1319(d), which is in turn limited by the general definition of "person" at 33 U.S.C. § 1352(5). Because CWA's general definition of "person" does not expressly include the United States, DOE contends that Congress did not intend to subject the United States to civil penalties under Section 505. *See* Pet. Br. at 32-33.

This argument is meritless. The Section 1352(5) definition of "person" is a general definition applicable only "except as otherwise specifically provided." [11] The citizen

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[11] The general definition states:

> Except as otherwise specifically provided . . .
>
> (5) The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.

33 U.S.C. § 1352(5).

suit provision, however, provides a specific definition of "person": a citizen suit may be commenced against "any person (including the United States)." 33 U.S.C. § 1365 (a)(1). "In these circumstances the law is settled that 'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling."'" *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957) (quoting *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944) and *D. Ginsburg & Sons v. Popkin*, 285 U.S. 204, 208 (1932)). The specific definition of person in the citizen suit provision is an instance. "otherwise specifically provided" for in 33 U.S.C. § 1352 (5), in which that definition includes the United States. Accordingly, for the purpose of civil penalties incorporated into the citizen suit provision, the citizen suit provision's more specific definition of "person" must prevail over the statute's general definition.

C. The RCRA Citizen Suit Provision Unambiguously Waives Federal Facilities' Sovereign Immunity From Civil Penalties.

Section 7002 of RCRA, 42 U.S.C. § 6972, contains a citizen suit provision almost identical to that contained in CWA. Section 7002 subjects the federal government to suits by a person when a federal facility is in violation of RCRA standards and regulations and presents an "imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a). States are explicitly included among the "citizens" authorized to bring such actions. 42 U.S.C. § 6903(15). Section 7002 expressly gives district courts the authority in citizen suits to "apply any appropriate civil penalties under [42 U.S.C.] Sections 6928(a) and (g)." *Id.*

In an effort to import ambiguity into this clear provision, DOE argues that immunity from civil penalties is not waived because 42 U.S.C. § 6928 does not specifically mention civil penalties against the federal government. As with the virtually identical language of the CWA citizen suit provision, this strained argument is defeated by a natural reading of the plain language of the statute. *See* discussion *supra* at 14-15.

The legislative history of Section 7002 reinforces the statute's plain meaning. The Senate Report makes clear that

> Either a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and penalty provisions of section 7002. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, including the United States."

S. Rep. No. 284, 98th Cong., 1st Sess. 44 (1983). Thus, both the text and the legislative history of Section 7002 make clear that Congress intended to subject the United States to civil penalties under RCRA.

D. The RCRA Federal Facilities Provision Unambiguously Waives Federal Sovereign Immunity From Civil Penalties.

Section 6001 of RCRA, 42 U.S.C. § 6961, provides that:

> Each department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal government . . . shall be subject to and comply with all Federal, State, interstate and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting the control and abatement of solid waste

> or hazardous waste in the same manner and to the same extent as any person is subject to such requirements.

The core statement in RCRA's federal facilities provision is simple and clear: all federal facilities are subject to "all . . . requirements . . . in the same manner, and to the same extent, as any person." 42 U.S.C. § 6961. Furthermore, "[a]ny person that violates a requirement of this subchapter shall be liable . . . for a civil penalty." 42 U.S.C. § 6928(g). Section 6001 of RCRA thus clearly waives federal sovereign immunity from civil penalties.

By subjecting federal facilities to "all requirements," as it did in the CWA, Congress used the broadest language possible. To avoid any limitation of this language, Congress expressly provided that "requirements" include "both substantive and procedural" requirements, thereby encompassing the entire array of regulations, standards, and "enforcement mechanisms." In short, Congress took to heart this Court's guidance in *Hancock* in selecting the precise language it used to waive sovereign immunity from all enforcement mechanisms. *See* discussion *supra* at 12-13.

DOE nonetheless contends that Section 6001 does not waive sovereign immunity from civil penalties. DOE argues that the "including" clause in Section 6001 was meant to be an exclusive list of the types of requirements for which Congress intended to waive immunity. That argument misreads the "including" language in a manner recently rejected by the Court in *Norfolk & Western Railway Co.* There the Court interpreted the scope of 49 U.S.C. § 11341(a), an immunity provision that waived liability for certain conduct under "all" laws, and followed that waiver of liability with a specific list of laws preceded by the word "including." 111 S. Ct. at 1162. The Court held that the "including" phrase should not be understood as a limitation on the scope of the waiver. *Id.*

at 1163-64. *Cf. P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77 n.7 (1979) (broadly construing "including").

Indeed, in the present case, the use of the word "sanctions" in the "including" phrase in Section 6001 confirms that Congress intended to encompass sanctions within the word "requirements." There can thus be no doubt that "sanctions" are a subset of the requirements for which federal sovereign immunity is waived. Because civil penalties fall within the common definition of "sanctions," Congress's intention to waive immunity for civil penalties is clear.[12]

II. THE WAIVERS OF SOVEREIGN IMMUNITY AS TO CIVIL PENALTIES FOR FEDERAL FACILITIES ARE AN ESSENTIAL PART OF THE FEDERALIST REGULATORY SCHEME ESTABLISHED BY CWA AND RCRA.

Both CWA and RCRA are premised on innovative enforcement partnerships of the States and the federal government, and draw on the strengths of our federalist system of dual sovereignty. This federalist context—which DOE ignores—is crucial to a proper interpretation of the sovereign immunity provisions in these statutes. Because the States' role is so central to the CWA and RCRA regulatory schemes,[13] civil penalties are so integral to effective enforcement of these laws, and federal facilities are such substantial sources of pollution, Congress could not reasonably have intended to prevent States from using civil penalties when enforcing CWA and RCRA

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[12] Furthermore, because Congress's intent to subject the federal government to civil penalties in RCRA citizen suits, including citizen suits brought by States, is so clear (*see* Point I.C. *supra*), it would be incongruous to conclude that Congress did not intend to subject the federal government to such penalties in direct RCRA enforcement actions brought by the States.

[13] *See* discussion of the federal government's very limited enforcement role at federal facilities, *supra* at 3 & n.2.

against federal facilities. On the contrary, for these very reasons Congress affirmatively intended that States have the important enforcement mechanism of civil penalties available for use against all violators, including federal facilities.

Decentralized enforcement is critical to the effectiveness of these regulatory regimes. Because the sources of pollution are so numerous and dispersed, state authorities are better positioned to determine appropriate enforcement priorities, and will have strong incentives to do so because the primary effects of pollution will be felt locally.[14] For these reasons, CWA and RCRA invest primary responsibility for enforcement in the States.

Civil penalties are an important weapon in the States' enforcement arsenals.[15] Absent the threat of such penal-

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[14] "Much of the nation's environmental legislation relies on state implementation, on the theory that state governments are better situated to address local problems." Comment, *Lawmaker as Lawbreaker*, *supra*, 57 U. Chi. L. Rev. at 867. *See* The Federalist Nos. 45 and 46 (J. Madison) ("By the superintending care of [the States], all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of [the States], the people will be more familiarly and minutely conversant.").

[15] The ubiquitous presence of civil penalty provisions in the U.S. Code attests to the utility of civil penalties as a tool of regulatory policy. *See, e.g.*, the Atomic Energy Act, 42 U.S.C. § 5841; Bank Holding Company Act, 12 U.S.C. § 1847; Bank Protection and Security Act, 12 U.S.C. § 1884; Clean Air Act, 41 U.S.C. § 7413 (d); CERCLA, 42 U.S.C. § 9609(a)-(c); Consumer Product Safety Act, 15 U.S.C. § 2069; Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11045; Fair Housing Act, 42 U.S.C. § 3614; Fair Labor Standards Act, 29 U.S.C. § 216; Federal Aviation Act, 49 U.S.C. § 1475; Federal Election Campaign Act, 2 U.S.C. § 437(g); Federal Food Drug and Cosmetic Act, 21 U.S.C. § 333; Federal Home Loan Mortgage Corporation Act, 12 U.S.C. § 1457; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(a); Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 2007; Hazardous Materials Transportation Act, 49 U.S.C. § 1809

ties, a polluter has little reason to comply with regulations unless and until the regulatory authority obtains a judicial order requiring compliance. Given the limited resources generally available to regulatory authorities, the threat of civil penalties is an important means for increasing compliance. Civil penalties also give regulatory authorities an option short of seeking massive structural injunctive relief when a particular violator might be more appropriately brought into line through less harsh measures.

DOE offers no persuasive reason why Congress would have chosen to exempt federal facilities from civil penalties under CWA and RCRA, but waive sovereign immunity for all other enforcement mechanisms—and none exists. When Congress passed these laws, it knew that federally owned facilities were major polluters.[16] Prohibiting States from using civil penalties to combat the serious environmental threat posed by federal facilities would be utterly inconsistent with Congress's objective in waiving sovereign immunity.

Indeed, DOE's interpretation of CWA and RCRA is incongruous. In DOE's view, States would be prohibited from seeking civil penalties against federal facilities, but would be empowered to seek sweeping structural injunctive relief against federal facilities, including massive monetary sanctions to coerce compliance with injunctive orders. Because injunctive relief and contempt sanctions are likely to impose far greater costs on the federal government than would civil penalties, DOE's reading of these statutes cannot be justified as an effort to protect the federal fisc. Furthermore, prohibiting the States from using civil penalties increases the risk of prolonged non-

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(a); Occupational Safety and Health Programs, 29 U.S.C. § 666.

[16] *See, e.g.*, S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4326, 4392 (CWA); H.R. Rep. No. 294, 95th Cong., 1st Sess. 199 (1977) (same).

compliance by federal facilities. Those facilities will have absolutely no incentive to comply with CWA and RCRA until ordered to do so by a court. Disabling States from seeking civil penalties would also force States to resort to more drastic injunctive measures more quickly, when the less drastic remedy of a penalty might be more appropriate to a regulatory problem.

These considerations should inform the Court's analysis of the waivers of sovereign immunity in CWA and RCRA. *Cf. Canadian Aviator*, 324 U.S. at 224-25 (waiver upheld in part because no logical reason for construction urged by government). DOE's reading of CWA and RCRA "'impute[s] to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none.'" *Franchise Tax Bd. v. United States Postal Service*, 467 U.S. 512, 524 (1984) (quoting *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 394 (1939)). As in *Franchise Tax Bd.*, Congress's waiver of sovereign immunity should not be construed to produce anomalous results.

Additionally, if DOE's reading of the sovereign immunity provisions in CWA and RCRA prevails, federal facilities will be immune from civil penalties in enforcement actions brought by States while state and local facilities would remain fully subject to civil penalties in enforcement actions brought by the federal government.[17] Exempting the federal government from civil penalties that remain applicable to state and local governments would be utterly inconsistent with the States' role as equal partners in the innovative regulatory partnership established by CWA and RCRA.

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[17] *See Cleanup at Federal Facilities: Hearings Before the House Subcommittee on Transportation, Tourism, and Hazardous Materials, supra*, at 218-228 (subcommittee report documenting numerous civil penalties against state and local governments obtained under federal environmental laws, including CWA and RCRA).

CONCLUSION

The judgment of the court of appeals should be affirmed with respect to Section 313 of CWA and Section 7002 of RCRA, and should be reversed with respect to Section 6001 of RCRA.

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